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OGC HAS REVIEWED.

23 July 1953

Memorandum for the Record

From: [redacted] 25X1A

Subject: Report of Informal Hearing with [redacted] 25X1A

Introduction

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Representatives of the Government and [redacted] met at 10:00 A.M., 22 July 1953, in the Logistics Office to confer further regarding the assessment of liquidated damages arising out of contracts 25X1A [redacted] It appears that the aforesaid meeting may be the final meeting on these contracts. Hence, a memorandum for the record is considered appropriate, the purpose being to outline the facts, the law, conclusions and recommendations of this office. More specific facts will be forwarded to the DD/A by the Logistics Office. The voluminous record on the aforesaid contracts permits no more than general statements at this time. Any factual background or supporting documents may be obtained from the offices having custodial responsibility. It is the purpose of this memorandum for the record that it be used in connection with the presentation to the DD/A for appropriate action.

Facts - General

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[redacted] and the Government, as represented by this Agency and predecessor organizations, have had a contractual history in excess of ten years. From time to time during this period [redacted] plant capacity has almost been wholly dedicated to Agency procurement. An extremely close relationship between [redacted] 25X1A technical representatives and the Government's technical representatives developed during this period of contracting with the Government. It was not uncommon for changes to be orally directed by technical officers of the Agency. It is a matter of record that these changes were usually accepted in good faith by [redacted] and that at some subsequent period the contracting officers of the Government would amend the contract to the extent required whether it be an adjustment in price, a change in the period of delivery, or some other matter material to the contract.

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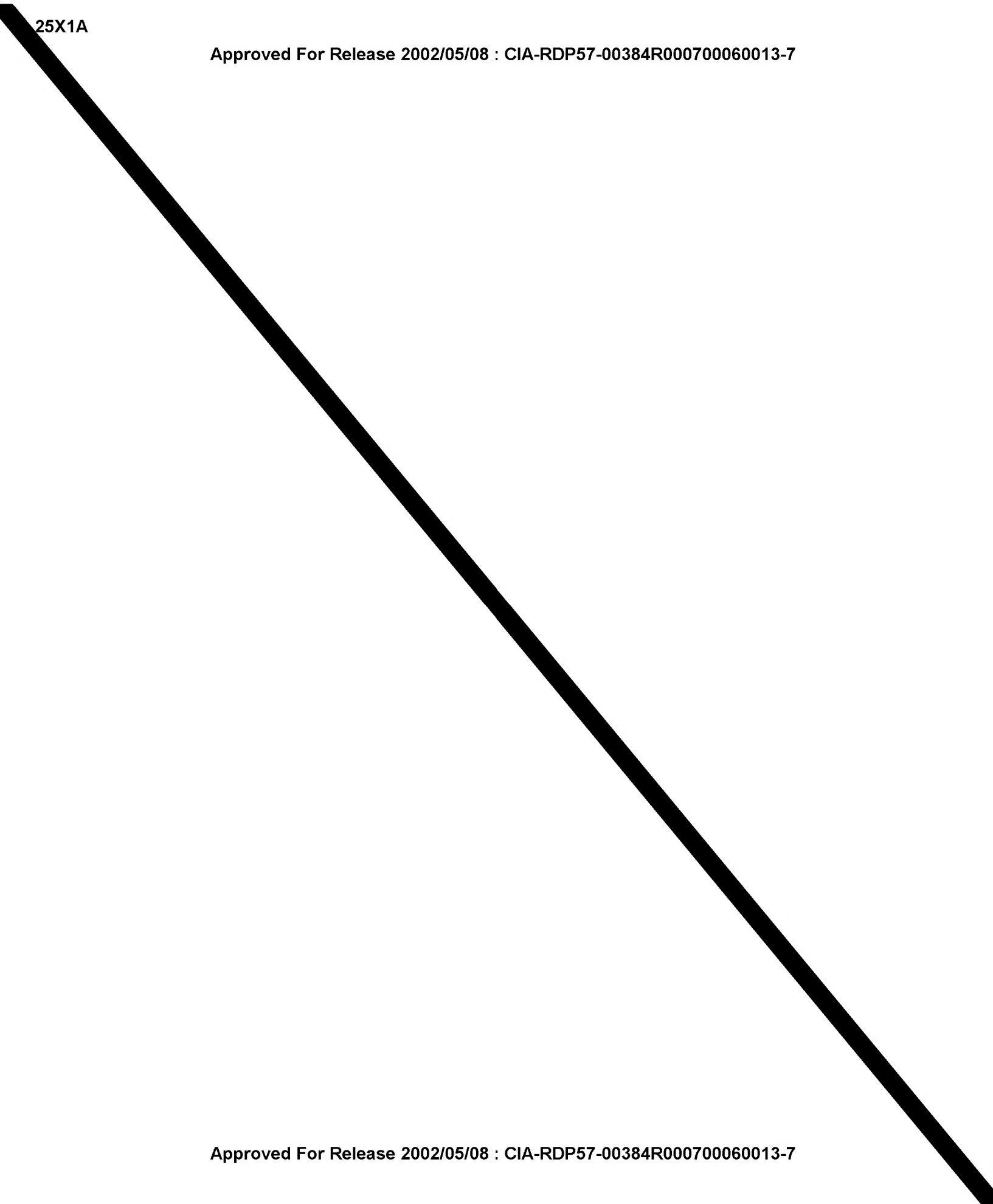
The contracts of concern are [redacted]
Other contracts were being performed during the period of the aforesaid contracts but are not considered pertinent. Although the aforesaid contracts have been termed "production contracts" in the hearings and discussions between the two parties, it is generally agreed that the contracts are more akin to production-research contracts. The specifications in these contracts are basically performance specifications. It is recognized Government policy as articulated by the Departments of the Army, Navy, and Air Force, that liquidated damages are not for insertion in cost-reimbursement type contracts. Hence, the insertion of liquidated damage clauses in contracts which were essentially cost-reimbursement or production-research, was not sound practice. It was inevitable, as past history confirms, in many instances that the scientific or technical representatives of the Agency, and the contractor's representatives themselves, would discern many possible improvements in the course of production-research. Such improvements normally would produce delays rather than accelerate delivery. It is also apparent from the very voluminous record that the injudicious use of the liquidated damage clause in the aforesaid contracts was compounded by the lack of business acumen and common sense on the part of the contractor.

There is considerable evidence of a long and substantial series of changes some of which were formalized by change orders, others by supplemental agreements, and others which were buried in obscurity or concealed in the various files within the Agency and which were brought to the surface only after countless hours of painstaking research, discussion, arguments and hearings on the part of Agency representatives.

The record reflects that there are some areas in which the contracting officer is competent to act, and has acted, by extending the period of performance for the various contracts either by recognizing that delays were in fact attributable to Government action or that certain provisions of the contracts were not for application. Within these areas the undersigned has ruled that the contracting officer is competent to act. There are other areas where it is utterly impossible to ascertain the extent of the delay or to determine or apportion the responsibility therefore. The undersigned has advised the contracting officer that he is not competent to act within this area and that the matter is for referral to other appropriate officials of the Agency.

Starting with a formal hearing in May 1952, where certain issues were resolved (Refer, Formal Disputes Hearing, Central Intelligence Agency and [redacted] 25X1A
1952), this matter has been actively pursued until the point has been reached where no useful purpose can possibly be served by further discussion or attempts to develop additional facts.



a modification of a specification within the scope of the Changes Article, the courts have been consistent in dnying additional compensation for changes made by the contractor without the authority of the contracting officer or on the oral request of the contracting officer. In Plumley v. U. S., 226 U. S. 545 (1913), it was held:

> "The contract provided that changes increasing or diminishing the cost must be agreed on in writing by the contractor and the architect, with a statement of the price of the substituted material and work. Additional precautions were required if the cost exceeded $500.00. In every instance, it was necessary that the change should be approved by the Secretary. There was a total failure to comply with these provisions, and though it may be a hard case, since the court found that the work was in fact extra and of considerable value, yet Plumley cannot recover for that which, though extra, was not ordered by the officer and in the manner required by the contract."

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The effect of the long-established manner of doing business with [redacted] the ratification by the contracting officers of the Government of the acts of scientific and technical representatives over a period of ten years, and the issuance of change orders and, in fact, alterations to the contracts, are matters which could lead to interminable argument. This is not to say that the position of the Government is not strong for it is. However, the strength of the Government position does not per se establish the weakness of the contractor's position. This is merely to say that the position is legally arguable.

B. Delays - Damages Article

The aforesaid contracts included a delays-damages article. This clause in substance provides that the Government has the right to terminate the contractor's right to proceed with the contract or such part of it as to which there has been a delay if the contractor fails to make deliveries of supplies within the agreed time, unless the delay is excusable. An "excusable delay" is defined as one which occurs without fault or negligence on the part of the contractor, and is due to unforeseeable causes beyond the contractor's control. All three factors -- absence of fault or negligence, unforeseeable causes and lack of control -- must be present, though there is authority under the ASPR's to eliminate the requirement of unforeseeable causes at the discretion of the contracting officer. Causes of excusable delays include, but are not limited to, acts of God, acts of a public enemy, acts of another Government contractor ..... and excusable delays of subcontractors from the same cause.

The case of U. S. v. Brooks-Calloway Co., 318 US 120 (1943) adequately states the law on this subject. The language of that decision has been cited in numerous decisions of the Comptroller General including 23 C. G. 27. In the latter decision the Comptroller General summarized the ruling as follows:

> "Hence, there now can be no doubt, that in order for an act of the Government to be classed as an excusable cause for failure to perform properly under a contract such as here involved, it first must be established that the act was so abnormal, extraordinary, or unusual, that it reasonably could not have been foreseen and provided against in the contract."

An unusual argument advanced by the contractor during the course of the hearing was that the specifications of the Government were so restrictive, as indeed they were, that the contractor was forced into the independent and uncooperative hands of the [redacted] 25X1A 25X1A whose record for the production of qualitative items was extremely bright, but whose record for timely delivery was exceedingly dark. The contractor has argued that since the item concerned, i.e., a condenser, was proprietary with [redacted] 25X1A and its capacity at that time was being utilized to maximum productivity, an attempt to obtain a comparable liquidated damage situation with [redacted] 25X1A was hopeless. Counsel for [redacted] 25X1A has suggested that this matter can be recognized as an excusable delay and pardonable by the contracting officer. The undersigned on the other hand, has argued that the provisions of the contract are controlling, that the law does not sustain the position advanced, and that the representatives of the Government have no authority to waive what in fact is a vested right. There are no decisions in point but in all probability in this connection I believe the position of the Government could be sustained in an action at law.

C. Liquidated Damages

It may be generally stated that Government policy is opposed to the general use of provisions for liquidated damages for delays in performance. As indicated heretofore, it is particularly opposed, in fact will not permit, the insertion of liquidated damage clauses in cost-reimbursement type contracts particularly where the nature of the contract is in part developmental research. In general, a provision which purports to be one for liquidated damages cannot be enforced. Kennedy v. U. S., 24 CT. Cl. 122 (1889). Whether a provision is sustainable as one for liquidated damages depends on the effort of the parties to estimate in advance the actual damage resulting from a breach. There is

some evidence that the concern of the drafting authorities of the aforesaid contracts was an effort to "jack-up" the contractor in his delivery schedules. Through a period of ten years of contracting the contractor had never failed to perform, though admittedly there is some experience of delay. In short, since the amount appearing in the various contracts may have been fixed in fact without exclusive regard to the probable actual damage but as an aid to delivery, the question of a penalty becomes arguable. It has been held that the greater the difficulty in accurately calculating probable actual damage, the more readily will a provision for liquidated damages be upheld. U. S. v. Bethlehem Steel Company, 205 US 105 (1907).

The law on liquidated damages is quite interesting where the delay is caused by both parties. Generally, the contractor is entitled to an extension of time co-extensive with the period of any delay caused by the Government. It is also entitled to relief from any assessment of liquidated damages for such period. The memorandum of the Logistics Office will reflect the areas in which the contracting officer has acted to grant an appropriate extension of time co-extensive with the period of delay caused by the Government. However, liquidated damages will not be assessed when the work has been delayed by both parties, and the actual delays caused by each cannot be definitely ascertained. Wharton Green and Co., Inc. v. U. S., 86 Ct. Cl. 100 (1938) holds as follows:

> "Under such circumstances, all the authorities hold that liquidated damages should not be imposed. In some of the decisions it is said that the provision with reference to time was waived; in some that the provision has been annulled; and in others it has simply been held that it could not be enforced. Also, in some other cases, it was said that when the defendant had delayed the plaintiff beyond the date prescribed by the contract, the court has no fixed date from which the contract could be enforced or liquidated damages computed."

Sustaining this position are U. S. v. United Engineering Company, 234 U. S. 236 (1914); Zweig Company v. U. S., 92 Ct. Cl. 472 (1941); Standard Steel Car Company v. U. S., 67 Ct. Cl. 445 (1929).

The courts will not attempt in a case where both parties are in default to accomplish any division or apportionment of liquidated damages where the contract contains no provision requiring such apportionment. U. S. v. Hunter, 137, F(2d) 828 (1943). At page 830 of the aforesaid decision the court stated as follows:

> "While it is doubtless true, as appellant contends, that no agent of the Government may waive a valid provision of a contract to which the United States is a party, it is equally true that one party to a contract may not recover for a breach where its acts have contributed to prevent or delay performance by the other party. To this extent the Government may be held to have waived the right to enforce the provision in question, since it was responsible, in part at least, for the delay of which it complains. 'We think the better rule is that when the contractor has agreed to do a piece of work within a given time, and the parties have stipulated a fixed sum as liquidated damages, not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time; and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived.' United States v. United Engineering & Const. Co., supra, 234 U.S. at page 242, 34 S. Ct. at page 845, 58 L.Ed. 1294."

A quotation from U. S. v. United Engineering Co., 234 U. S. at page 243 is supporting.

> "The law on the subject was very neatly put by Eyles, J., in Russell v. Sa da Bandeira, 13 C. B. N. S. 149, 32 L. J. C. P. N. S. 68, 9 Jur. N. S. 718, 7 L. T. N. S. 804. This principle is applicable not to building contracts only, but to all contracts. If a man agrees to do something by a particular day, or, in default, to pay a sum of money

as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time."

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Needless to say, Counsel for [redacted] has argued vigorously and extremely well that the contracts under discussion evidence many instances of mutual delay and the impossibility on the part of the contracting officer to assess liquidated damages with any degree of mathematical accuracy. Obviously, he has reference to the principles referred to in the cited cases. I am unwilling to say at this time that the contractor would be unable to establish this point, particularly if there were brought to the court the series of contracting officers who signed the various contracts, change orders and supplemental agreements, and the changing parade of scientific and technical officers of the Government throughout the period of performance. As indicated heretofore, I am also unwilling to state that the Government would not be able to sustain its position. At best, I believe the respective litigants would have a fair chance of sustaining their respective positions.

Most contracts provide that the number of days of delay chargeable to contractors for purposes of assessing liquidated damages is a question of fact, subject to decision by the contracting officer under the normal Disputes Article with ultimate reference to the Agency head whose decision on appeal is final and conclusive in the absence of bad faith or gross error.

Another facet of these contracts which has escaped discussion up to this time is the inability of the Government to assess liquidated damages based upon an agreed unit price. This is not to be considered a reflection on the part of the representatives of the Government. This is merely to state that the records of the contractor were such that an audit was possible only on a total cost basis. Hence, a legal technicality exists were the Government to impose liquidated damages, for there is no acceptable basis on which liquidated damages may rest.

Prior to the enactment of the Armed Service Procurement Act, no agent or officer of the Government had authority to waive a provision in a Government contract for assessment of liquidated damages. 17 C. G. 354 and cases therein cited adequately state the law. A pertinent part of said decision is quoted.

"The contract expressly provided that you would pay the Government liquidated damages in the amount of one percent of the purchase price per unit for each calendar day of delay not excusable under the terms of the contract. Under this provision the right to the stipulated liquidated damages accrued to, and vested in, the United States by reason of such delay, and no officer of the Government has authority to waive such provision of the contract or to remit the claim of the Government for the amount of liquidated damages legally accruing to the United States thereunder. Pacific Hardware Co. v. United States, 49 Ct. Cls. 327, 335, 337; Bausch & Lomb Optical Co. v. United States, 78 Ct. Cls. 584, 607; American Sales Corporation v. United States, 27 F.(2d) 389, affirmed 32 F.(2d) 141, certiorari denied, 280 U.S. 574."

Section 6 of the Armed Service Procurement Act provides that the Comptroller General, on the recommendation of the agency concerned, is authorized and empowered to remit the whole or any part of the liquidated damages assessed against a Government contractor as may be just and equitable. The purpose obviously of this clause is to protect contractors against harsh treatment in the administration of any "Liquidated Damages" clause. This recommendation power has been expanded to include any Federal agency under Section 10 of the Federal Property and Administrative Services Act of 1949. [redacted] FOIAb5

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Conclusion

Ordinarily, if the issues arising out of the foregoing contracts are not settled by mutual agreement, the next step will be a full hearing to be conducted by the contracting officer. In the event of an unfavorable decision appeal would most likely be made to the Agency head. Ultimately the matter might be heard in the Court of Claims where issues of fact resolved at the agency level would be considered final and conclusive in the absence of bad faith or gross errors. However, such matters as the interpretation of the contracts, unliquidated damages, etc. present questions of law rather than of fact, and the matter is properly one for decision by the courts. As indicated above, I believe the respective legal positions are arguable and would not be re-

solved with any finality in the absence of a mutual settlement or litigation. [redacted]

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Recommendations

A. That the action of the contracting officer in consequence of the many hearings (as reflected in the separate memorandum which will accompany this memorandum) be considered final and part of the general settlement agreement.

B. That liquidated damages be remitted on the basis aforesaid.

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[redacted]

E. That in view of the fact that the appropriations concerned have lapsed and that the sum involved is in excess of $10,000, that the DD/A approve the payment, if any, under the authority of [redacted] of the Confidential Funds Regulations.

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Assistant General Counsel

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